CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 547.

THE UNITED STATES, PLAINTIFF,

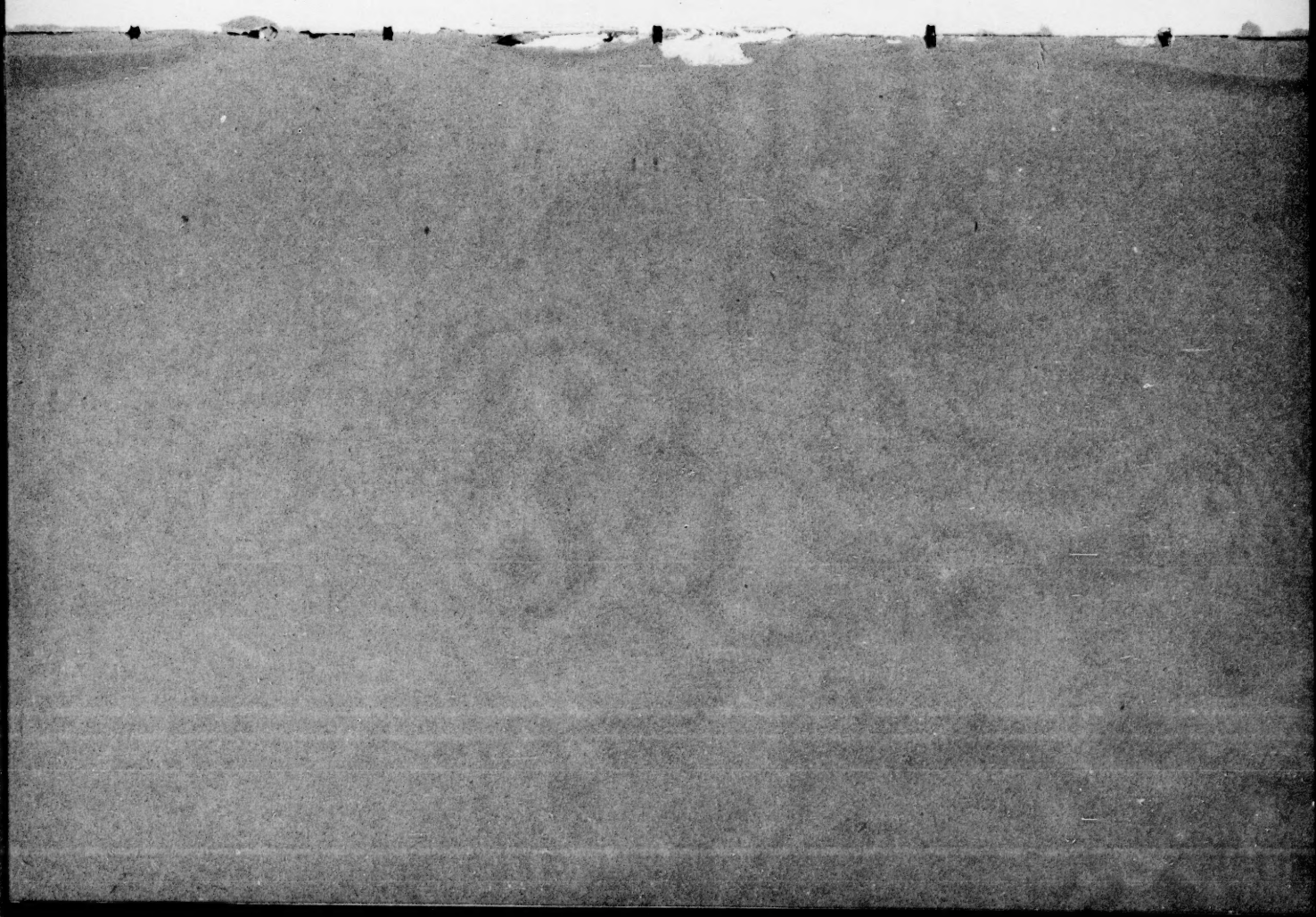
vs.

HENRY HEWECKER.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 25, 1896.

(16326.)



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1 United States circuit court, southern district of New York.

THE UNITED STATES OF AMERICA)
vs.
HENRY HEWECKER.)

Statement of facts and certificate of division of opinion to the United States Supreme Court.

An indictment having been found against defendant, Henry Hewecker, in the United States circuit court for the southern district of New York, the same having been filed in open court on the 10th day of March, 1896, the defendant was called upon to plead to the same on the 11th of March, 1896, and thereupon pleaded not guilty, he being then and there present in person and represented by counsel. On the 20th day of May, 1896, at a regular term of the said circuit court for the southern district of New York, held exclusively for the trial and disposal of criminal cases, and presided over by Hon. Addison Brown, the defendant, Henry Hewecker, by permission of the court, withdrew his plea of not guilty, he being then and there present in person and represented by counsel, and entered a special plea in the nature of a plea in abatement.

The indictment (a copy of which is annexed, marked Exhibit
2 A) is in two counts, being based on Revised Statutes, section 5339.

In the first count it is charged that Henry Hewecker did on the 17th of January, 1892, in the haven and bay of Havana, off the Island of Cuba, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, on board an American vessel named Rebecca J. Moulton, maliciously and with malice aforethough' shoot one Edward J. Miller, on board said vessel, with a revolver loaded with leaden bullets and charged with gunpowder, inflicting a mortal wound, from which said Miller, on the 21st day of January, 1892, died on land in a hospital in Havana, on the Island of Cuba. The count concludes with the statement that said Hewecker thereby piratically, feloniously, wilfully, maliciously, and with malice aforethought did kill, slay, and murder said Miller, and that the southern district of New York is the district in which said Henry Hewecker was found and into which he was first brought.

In the second count it is charged that Henry Hewecker, on the 17th day of January, 1892, in the haven and bay of Havana, off the Island of Cuba, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, on board the American vessel Rebecca J. Moulton, piratically, feloniously, wilfully, maliciously, and of his malice aforethought did shoot one Edward J. Miller on board said vessel, inflicting a mortal wound, from which said Miller died on the 21st day of January, 1892, on land, in Havana, in the Island of Cuba, without the United States, and it concludes
3 with the statement that the southern district of New York is the district in which said Henry Hewecker was found, and into which he was first brought for the offense aforesaid.

In the special plea in abatement, duly filed (a copy of which is annexed, marked Exhibit B), it was set up that the United States ought not to further prosecute or try the said indictment against said Henry Hewecker,

because the same was not found until the 10th day of March, 1896; that it appears upon the face of the indictment that Hewecker shot Edward J. Miller on the 17th day of January, 1892, on board the American schooner Rebecca J. Moulton, in Havana, off the Island of Cuba, and that Miller thereafter, on the 21st of January, 1892, died from such wounds on land, in a hospital in Cuba, without the United States. It is further alleged that said death took place more than three years prior to the finding of said indictment; that such charges, if true, do not, under the laws of the United States, constitute the crime of murder, and that therefore, under and by virtue of section 1043 of the Revised Statutes of the United States, this defendant should not be prosecuted or tried. The said plea further alleges that from the 17th day of January, 1892, until the date of the finding of the said indictment, defendant had not fled from justice, but had been, in the meantime and at all the times between such dates, confined in a prison at Havana, Cuba, under a charge and conviction for an assault inflicted in the city of Havana, and the said defendant therefore says that the offense with which he is charged by the said indict-
4 ment is barred by the statute of limitations, and that the United States ought not to further prosecute the same.

The United States thereafter, on the said 20th day of May, 1896, by Wallace Macfarlane, their attorney for the southern district of New York, interposed a demurrer to said special plea (a copy of which is annexed, marked Exhibit C) on the ground that the matters therein contained, in manner and form, are not sufficient in law to bar said plaintiffs, and that they are not bound by law to answer the same.

Argument was thereupon had on said demurrer on behalf of each of the parties, and briefs were submitted.

On the 22nd day of May, 1896, at a term of said court appointed exclusively for the trial and disposal of criminal cases, and held by the Hon. E. Henry Lacombe, United States circuit judge, and the Hon. Addison Brown, defendant Henry Hewecker being present in person and represented by counsel, and the United States being duly represented by counsel, argument on said demurrer to said special plea was continued before said court, composed of the judges above named, and at the conclusion of said argument it was announced by the court that the judges are divided in opinion upon certain questions of law arising upon said demurrer, and it was thereupon, upon motion of Wallace Macfarlane, United States attorney for the southern district of New York, ordered by said court that the points upon which they disagreed should, during said May term, be stated, under the direction of the judges
5 and certified under the seal of the court, to the Supreme Court of the United States at their next session, and that inasmuch as no further proceedings in said cause can lawfully be had under R. S., 1043, provided said plea is good, that the further hearing of said cause be continued pending the arrival of instructions from said Supreme Court upon the points upon which the judges disagree and are divided in opinion.

Upon these facts the court desires instruction upon the following three questions of law arising upon said demurrer, and as to each of which questions the said judges are divided in opinion and upon which they disagree, the questions being the same, the certification of which to the

Supreme Court was requested by the United States attorney for the southern district of New York, as hereinbefore set forth:

1. The first question arising on said demurrer, and upon which the instruction of the Supreme Court is prayed, and upon which the judges are divided, is: In case of death, resulting on land in a foreign country, and without the jurisdiction of any particular State, from a shot inflicted four days before death by defendant, unlawfully, wilfully, feloniously, maliciously, and of malice aforethought, upon an American citizen, on an American vessel within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, is the offence wilful murder within R. S., 1043 the indictment alleging that defendant did kill, slay, and murder, and being based upon the second paragraph of R. S., 5339?

6 2. The second question as to which the instructions of the Supreme Court are prayed, and upon which the judges are divided, is: Is the offence of maliciously and of malice aforethought shooting at and thereby inflicting a mortal wound upon another person, on an American vessel, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, of which mortal wound thus inflicted such other person dies on land without the United States four days later, within the exception to the statute of limitations, R. S., section 1043, the count being based upon the third paragraph of R. S., 5339?

3. The third question as to which the instructions of the Supreme Court are prayed, and upon which the judges are divided, is: In case one commits an offence upon the high seas within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and is thereafter, before returning to the United States, confined in prison in a foreign jurisdiction for another offence, and is not within the jurisdiction of the United States until more than three years after the commission of the offence charged, said offense being other than wilful murder, is a prosecution upon an indictment found against said offender immediately after his return to the United States in the district in which he is found or into which he is first brought, as required by R. S., 730, barred by the provisions of the statute of limitations,

7 R. S., 1043?

Settled and dated the southern district of New York, May term, 1896.

June 15, 1896.

E. HENRY LACOMBE,
U. S. Circuit Judge.
ADDISON BROWN,
U. S. District Judge.

8 *Memorandum.*

The direction of the judges on application of the U. S. attorney, that the questions involved in the demurrer be certified to the Supreme Court, though made after the date of the recent decision in U. S. vs. Ryder (May 18, 1896), was before that decision was made known to them. Subsequently, on receiving and carefully considering the opinion of the

court in the case last cited, it has seemed proper not to cancel the former order for said certificate of division for the following reasons:

1. Because in the Ryder case the certificate was issued in a case wherein the defendants were convicted, and upon which they had a remedy by appeal to the circuit court of appeals; and in the other classes of cases referred to by the Supreme Court, a double hearing, before and after final judgment, it is said, would be the consequence of allowing such a certificate; and the decision seemed to proceed upon the ground that the party moving for the certificate had an adequate remedy under the provisions of the judiciary act of March 3, 1891;

Whereas in the present case the United States, the petitioner, has no right of appeal to the court of appeals under that act as construed by the late decision in U. S. vs. Sanges, 144 U. S., 310; nor any right of review in any form whatever, before the Supreme Court or elsewhere, except through the allowance of a certificate of division under sec. 651.

2. Because the question here presented as to the right of the United States to proceed upon a certificate of division was not before the Supreme Court in the Ryder Case, and the reasons assigned by the court for its decision in that case do not seem clearly applicable to the present
9 cause.

3. Because, if this court should refuse the certificate moved for by the U. S. attorney, it would deny to the United States a long-existing remedy, and the only remedy in its behalf in criminal causes, although the incompatibility of a remedy by certificate and the judiciary act of March 3, 1891, which was the ground of the decision in the Ryder Case, is not clearly seen to exist as respects such applications by the United States; and inasmuch as repeals by construction or by implication are not favored as respects a sole and valuable remedy where no substitute for the existing remedy is provided, it has seemed most appropriate that the order for this certificate should be allowed to stand, in order that the Supreme Court may have before it for decision the question whether in case the United States is not entitled to any right of appeal to the circuit court of appeals under the act of March 3, 1891, its former right to a certificate in criminal causes has by that act been taken away; and if not, that the questions in difference upon said demurrer may be finally adjudged.

4. Because, moreover, by sec. 1043 the court in the cases therein provided for is forbidden to proceed with the trial.

Dated, New York, June 16, 1896.

E. HENRY LACOMBE,
U. S. Circuit Judge.
ADDISON BROWN,
U. S. Dist. Judge.

10 EXHIBIT A.

Circuit court of the United States of America for the southern district of New York, in the second circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the eighth day of January, in the year of our Lord one thousand eight hundred and ninety-six, and continued by adjournment to and including the tenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present, that Henry Hewecker, late of the city and county of New York, in the district and circuit aforesaid, did heretofore, to wit, on the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-two, and within the jurisdiction of this court, not having the fear of God before his eyes, but being moved and induced by the instigation of the devil, in the haven and bay of Havana, off the Island of Cuba, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, that is to say, in and on board of a certain American vessel, being a schooner named Rebecca J. Moulton, belonging to one Josiah W. Cook, who is, and the time hereinbefore mentioned was, a citizen of the United States, the said vessel being then and there situated in the haven and bay, as aforesaid, with force and arms, in and upon
11 one Edward J. Miller, in the peace of God and of the said United States then and there being, piratically, feloniously, wilfully, maliciously, and of his malice aforethought, make an assault, and that he, the said Henry Hewecker, with a certain revolver to him then and there belonging, which said revolver he the said Henry Hewecker in his right hand then and there had and held, him the said Edward J. Miller, he the said Miller then and there being a citizen of the United States and being in and on board of said vessel, Rebecca J. Holton, did shoot, the said revolver being then and there loaded with leaden bullets and charged with gunpowder, one of which said bullets said Henry Hewecker then and there by force of said gunpowder did wilfully, feloniously, and of his malice aforethought discharge and sent forth as aforesaid, him the said Miller then and there in and upon his body did strike, penetrate, and wound, thereby inflicting a deep and grievous mortal wound in the right side of the neck of said Miller one centimeter in diameter, through which said bullet penetrated and entered into the left lung of said Edward J. Miller, and in manner as aforesaid inflicting on said Miller a mortal wound, he the said Edward J. Miller, from the said 17th day of January, 1892, until the 21st day of January, 1892, did languish and languishing did live, and on the said 21st day of January, 1892, on land, in the Hospital Nuestra Senora de las Mercedas, in Havana, in said Island of Cuba, without the said United States, of the said grievous and mortal wound did die.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Henry Hewecker, him the said Edward J. Miller, in manner and form and by the means aforesaid, piratically, feloniously, wilfully, maliciously, and of his malice aforethought did kill, slay, and murder, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided.

12 And the jurors aforesaid, on their oath aforesaid, do say that the said southern district of New York in the said second circuit is the district in which the said Henry Hewecker was found, and into which he was first brought for the offense aforesaid.

13 SECOND COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that the said Henry Hewecker, late of the city and county of New York, in the district and circuit aforesaid heretofore, to wit, on the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-two, and within the jurisdiction of this court, in the haven and bay of Havana, off the Island of Cuba, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, that is to say, in and on board of a certain American vessel, being a schooner named Rebecca J. Moulton, belonging to one Josiah Cook, who is and at the time hereinbefore mentioned was a citizen of the United States, the said vessel being then and there situated in the haven and bay as aforesaid, with force and arms did one Edward J. Miller piratically, feloniously, wilfully, maliciously, and of his malice aforethought shoot, said Edward J. Miller being then and there a citizen of the United States, and being in and on board of said vessel Rebecca J. Moulton, he, said Hewecker, thereby inflicting a grievous and mortal wound in the neck of said Miller, through which a bullet discharged as aforesaid by said Hewecker did penetrate the body and enter into and through the left lung of said Edward J. Miller, from which shooting said Miller, on the 21st day of January, 1892, on land, in the Hospital Nuestro Senora de las Mercedas, in Havana, in said Island of Cuba, without the United States, died, all of which against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

And the jurors aforesaid, on their oaths aforesaid, do say that the said southern district of New York, in the said second circuit, is the

14 district in which the said Henry Hewecker was found, and into which he was first brought for the offense aforesaid.

WALLACE MACFARLANE,
U. S. Attorney.

15 EXHIBIT B.

United States circuit court, southern district of New York.

UNITED STATES)
against
HENRY HEWECKER.)

Now comes the defendant, Henry Hewecker, in person, and having heard the said indictment read, says:

That the United States ought not to further prosecute or try the said indictment against him, the said Henry Hewecker, because, he says, that it appears that the indictment herein was not found until the 10th day of March, 1896; that it appears upon the face of said indictment to be charged that the said defendant, Henry Hewecker, did, on the 17th day of January, 1892, on board the American schooner Rebecca J. Moulton, in the harbor of Havana, off the Island of Cuba, with a certain revolver shoot one Edward J. Miller, inflicting a wound, from which wound the said Edward J. Miller thereafter, and on the 21st day of January, 1892, on land, in the hospital in Cuba, without the United States, did die, and said defendant alleges that said death took place more than three years prior to the finding of said indictment.

That such charges, if true, do not, under the laws of the United States, constitute the crime of wilful murder, and that, therefore, under and by virtue of section 1043 of the Revised Statutes of the United States, this defendant should not be prosecuted or tried.

16 The said defendant, for a further plea, says that from the 17th day of January, 1892, and until the date of the finding of the said indictment, that he had not fled from justice, but that he had been in the meantime, and at all the times between said dates, confined in the prison at Havana, Cuba, under a charge and a conviction for an assault inflicted in the city of Havana, and the said defendant therefore says that the offense with which he is charged by the said indictment is barred by the statute of limitations, and that the United States ought not to further prosecute the same, and that he, the said Henry Hewecker, is ready to verify the same; and wherefore he prays judgment that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

HENRY HEWECKER.

17 EXHIBIT C.

United States circuit court, southern district of New York.

THE UNITED STATES OF AMERICA)
vs.
HENRY HEWECKER.)

Now come the United States, by Wallace Macfarlane, their attorney for this the southern district of New York, and having heard the special plea of defendant Henry Hewecker herein read, they say:

That the plea of the said defendant and the matters therein contained, in manner and form, are not sufficient in law to bar the said plaintiffs,

and that they are not bound by law to answer the same; and this they are ready to verify.

Wherefore, for want of sufficient plea in this behalf, the said plaintiffs pray judgment.

WALLACE MACFARLANE,
U. S. Attorney.

18 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22nd day of June, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred and twentieth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

19 (Indorsed:) U. S. circuit court, southern district of New York. United States of America versus Henry Hewecker. Statement of facts & certificate of division of opinion. Wallace Macfarlane, United States attorney, attorney for plaintiff.

(Indorsement on cover:) Case No. 16326. Term No., 547. The United States, plaintiff, vs. Henry Hewecker. S. New York, C. C. U. S. (Certificate of division.) Filed June 25th, 1896.

164-46

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,

164-46

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, PLAINTIFF,
v.
HENRY HEWECKER.
No. 547.

MOTION TO DISMISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, *Plaintiff*, *vs.* HENRY HEWECKER.	*No. 547.*

Motion to Dismiss.

Comes now Abram J. Rose, of counsel for Henry Hewecker, and on his behalf moves the Court to dismiss the certificate of division in opinion between the judges of the Circuit Court of the United States, for the Southern District of New York, for the want of jurisdiction.

Statement of the Case.

Henry Hewecker was indicted in the United States Circuit Court, for the Southern District of New York, on the 10th day of March, 1896. On the 11th day of March, 1896, he pleaded not guilty; on the 20th of May, 1896, his trial having been moved, by

leave of the Court, such plea was withdrawn and a special plea was entered by him. This plea, in substance, was that the Court should not further prosecute the indictment, as it was found more than three years after the offence was alleged to have been committed, and as the defendant had not fled from justice, a prosecution was barred by the provisions of Section 1043 Revised Statutes of the United States.

To this plea the United States demurred, and argument being had before the Circuit Court, held by two judges, they were divided in opinion as to the validity of such special plea, and pursuant to the provisions of Section 651 Revised Statutes of the United States, certified to the Supreme Court the questions upon which such division arose.

Argument.

It is respectfully submitted that, under the decision of this Court in United States *v.* Rider, 163 United States, 132, the Circuit Court has no authority to make the certificate in this case, and that such certificate does not give this Court jurisdiction of the cause.

In the above-cited case the Court, in its opinion, page 139, says: * * * "The particular question before us is whether United States Revised Statutes Sections 651-697, in relation to certificate of division of opinion in criminal cases, though not expressly repealed, still remains in force," and answering the question says, page 139: "We are of opinion that

the scheme of the act of March 3d, 1891 ('establishing Circuit Court of Appeals,') precludes the contention that certificates of division of opinion may still be had under United States Revised Statutes 651–697."

The division of opinion between the learned judges of the Circuit Court took place before the decision of the Rider case was known to them, but before the certificate was signed such decision was called to their attention; notwithstanding this, they made the certificate and filed with it a memoranda which seeks first to distinguish this case from the Rider case in that the questions arose in this case before final judgment, and if decided in favor of defendant, could not be reviewed; and second, this Court had not decided in the Rider case that the United States could not proceed upon a certificate of division; and third, that to hold that a certificate could not be made would result in depriving the United States of a remedy that had been long in existence and would or might work inconvenience in the enforcement of the criminal law.

With great deference to the learned Circuit Court, it is submitted, that whether the question arose before or after final judgment, or whether the United States or the defendant seeks the opinion of this Court on a doubtful question, can make no difference. The only power the Court had to make a certificate in a criminal case was derived from Sections 651 and 697, and the statute being repealed, the power to make a certificate is taken

away from the Court, and it is difficult to see how the time at which the application is made, the state of the litigation or the party invoking the action of the Court, affects the question or can restore to the Court the power taken away by the Legislature.

As to the suggestion that the repeal of these sections takes away a long existing remedy and may result in inconvenience, these suggestions might have been urged upon the law-making power before the passage of the Act of 1891, or might be reasons for re-enacting the sections repealed, but as said in the Rider case, page 140: "The argument *ab inconvenienti*—that in cases of doubt below the remedy by certificate ought to be available, is entitled to no weight in the matter of construction."

It is respectfully submitted that the certificate should be dismissed.

ABRAM J. ROSE,
Of Counsel for Defendant,
Henry Hewecker.

164-46

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CLERK

164-46

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, PLAINTIFF,
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REPLY OF THE UNITED STATES TO MOTION TO DISMISS.

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As to the suggestion that the repeal of these sections takes away a long existing remedy and may result in inconvenience, these suggestions might have been urged upon the law-making power before the passage of the Act of 1891, or might be reasons for re-enacting the sections repealed, but as said in the Rider case, page 140: "The argument *ab inconvenienti*—that in cases of doubt below the remedy by certificate ought to be available, is entitled to no weight in the matter of construction."

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REPLY OF THE UNITED STATES TO MOTION TO DISMISS.

The questions certified are as follows:

1. The first question arising on said demurrer, and upon which the instruction of the Supreme Court is prayed, and upon which the judges are divided, is: In case of death, resulting on land in a foreign country, and without the jurisdiction of any particular State, from a shot inflicted four days before death by defendant, unlawfully, willfully, feloniously, maliciously, and of malice aforethought, upon an American citizen, on an American vessel within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, is the offense willful murder within Revised Statutes, 1043, the indictment alleging that defendant

did kill, slay, and murder, and being based upon the second paragraph of Revised Statutes, 5339?

2. The second question as to which the instructions of the Supreme Court are prayed, and upon which the judges are divided, is: Is the offense of maliciously and of malice aforethought shooting at and thereby inflicting a mortal wound upon another person, on an American vessel, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, of which mortal wound thus inflicted such other person dies on land without the United States four days later, within the exception to the statute of limitations, Revised Statutes, section 1043, the count being based upon the third paragraph of Revised Statutes, 5339?

3. The third question as to which the instructions of the Supreme Court are prayed, and upon which the judges are divided, is: In case one commits an offense upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, and is thereafter, before returning to the United States, confined in a foreign jurisdiction for another offense, and is not within the jurisdiction of the United States until more than three years after the commission of the offense charged, said offense being other than willful murder, is a prosecution upon an indictment found against said offender immediately after his return to the United States in the district in which he is found or into which he is first brought, as required by Revised Statutes, 730, barred by the provisions of the statute of limitations, Revised Statutes, 1043? (Rec., p. 3.)

All of these questions are very important, entirely new, and such as may repeatedly arise.

The first involves the jurisdiction of the United States of a murder committed on one of its vessels in a foreign port, where the assaulted party has been taken ashore for medical attention and has died on land.

If a district and circuit judge sit in a cause and differ, and the opinion of the circuit judge be against the Government, the questions involved can not be determined by this court for the guidance of the lower court in the particular case, and other courts in similar cases, unless this court can entertain a certificate of division of opinion. In such cases the opinion of the circuit judge will prevail and the case will go out of court, even though the questions involved be so close that a district judge, perhaps of equal learning, differs in opinion.

It will be observed that in this case the disagreement was certified "upon motion of Wallace Macfarlane, United States attorney." (Rec., p. 2.)

In the case of *United States* v. *Rider* (163 U. S., 132), District Judge Sage was against the contention of the Government. *United States* v. *Rider* (50 F. R., 410), Circuit Judge Taft was against the parties indicted.

The effect of the refusal of this court to entertain jurisdiction was to leave the cause to proceed to judgment. No lasting harm could come from this course.

It does not appear from this record how the judges stood, but it does appear that the motion to certify was made by the Government.

The distinction sought to be made in this case was not considered by the court in deciding the case of *United States* v. *Rider* (163 U. S., 132).

While the language used by the court in that case is broad enough to include this case and every aspect presented by it, yet it is respectfully submitted that, in view of the results which will flow, the authority of the Rider Case should be limited.

The opinion in that case proceeds on the idea that the act of March 3, 1891, covered all cases provided for by laws existing when that act was passed, and that, inasmuch as the act of 1891 covered the whole subject, it was a substitution for all the existing laws and repealed them by implication.

The court says: "Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit courts of appeals." (163 U. S., 138.)

If it be that the law as it existed before the act of 1891 provided for the jurisdiction of this court in a case which the act of 1891 does not provide for and for which it gives no equivalent, and if, by holding that the act of 1891 supplanted all the laws on the subject of jurisdiction of this court in criminal cases, it results that a case arises in which this court formerly had jurisdiction, but now no court has jurisdiction, then certainly as to such case it seems reasonable to say that the act of 1891 did not apply, and that, as it did not cover the territory in question, it could not be said that it was intended to supplant a law which did cover it.

Sections 651 and 697 of the Revised Statutes are as follows:

> SEC. 651. Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court upon which the judges are divided in

opinion, the point upon which they disagree shall, during the same term, *upon the request of either party*, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment.

SEC. 697. When any question occurs on the hearing or trial of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order.

In respect of these sections the court in the Rider Case said: "While as to criminal cases a certificate of division was the only mode in which alleged errors could be reviewed." (163 U. S., 138.)

It is very certain that before the act of 1891 the circuit and district judges in a criminal case could, upon a disagreement, where the opinion of the circuit judge would, without such power to certify, prevail and discharge the prisoner, take instructions from this court, and that the Government, as well as the person indicted, could profit by this provision.

It is equally certain, if this right be taken away, that

the act of 1891 provides no way by which the circuit court of appeals or this court can review any erroneous action of the circuit judge, and that the act of 1891, in this respect, substitutes nothing for the right of certification which existed theretofore in such cases.

It avails nothing to say that before sections 651 and 697 were enacted the prisoner would have gone free, if a district judge alone or a circuit judge sitting with the district judge held the prisoner not answerable. The question here is whether one act supersedes another, and on the ground that it must have been so intended, inasmuch as the more recent act covers the whole field of legislation embraced by the prior act.

In testing such repeal by implication it will not do to say that the question here presented is a *casus omissus* under the act of 1891. The very fact that there is a *casus omissus* is a demonstration that the new act was not commensurate with the old, and where there is no express repeal this alone as to such case destroys the theory of repeal by implication.

In *Ex parte* Crow Dog (109 U. S., 556, 570) the court said:

> It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do

not work a repeal by necessary implication. *A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old.* (*Wood* v. *The United States*, 16 Pet., 342; *Davies* v. *Fairbairn*, 3 How., 636; *United States* v. *Tynen*, 11 Wall., 88; *State* v. *Stoll*, 17 Wall., 425.)

The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant*. "The general principle to be applied," said Bovill, C. J., in *Thorpe* v. *Adams* (L. R. 6; C. P., 135), "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, *or unless there is a necessary inconsistency in the two acts standing together*." "And the reason is," said Wood, V. C., in *Fitzgerald* v. *Champneys* (30 L. J. N. S. Eq., 782; 2 Johns. and Hem., 31–54), "that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

In *Chew Heong* v. *United States* (112 U. S., 536, 549) the court said:

> The utmost that could be said in the case supposed would be that there was an apparent conflict between the mere words of the statute and the treaty, and

that by implication the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure. But even in the case of statutes whose repeal or modification involves no question of good faith with the Government or people of other countries the rule is well settled that *repeals by implication are not favored, and are never admitted where the former can stand with the new act.* (*Ex parte* Yerger, 8 Wall., 85, 105.) In *Wood* v. *United States* (16 Pet., 342, 362) Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: "That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. *But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy.*" In *State* v. *Stoll* (17 Wall., 425, 430) the language of the court was that "it must appear that the later provision is certainly and clearly in hostility to the former. *If by any reasonable construction the two statutes can stand together, they must so stand.* If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.

The recent case of *United States* v. *New York* (160 U. S., 598, 609) seems directly in point. In that case the court said:

It is, nevertheless, suggested that the Bowman

Act, although without words of repeal, covers the entire subject of claims involving controverted questions of fact or law that may be transmitted to the Court of Claims from an executive department, and it is argued that we must apply the rule that a prior statute is to be regarded as repealed or modified where "the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute." (*Frost* v. *Wenie*, 157 U. S., 46, 58.)

If that act be held to have displaced the whole of section 1063 of the Revised Statutes (except the clause relating to claims transmitted by the Secretary of the Treasury upon the certificate of an Auditor or of the Comptroller of the Treasury), the result would be that after its passage the Court of Claims was wholly without jurisdiction to render *judgment* on any claim for money transmitted from an executive department, whatever its nature or amount. Such a construction would exclude from judicial cognizance by that court not only claims exceeding $3,000 in amount, and specifically designated as claims involving controverted questions of law and fact, but even claims the determination of which would affect a class of cases, or furnish a precedent for the future action of an executive department, and claims that involved an authority, right, privilege, or exemption asserted or denied under the Constitution of the United States.

Congress, when it passed the Bowman Act, must have had in view the provisions of section 1063 of the Revised Statutes, under which the Court of Claims had so long exercised jurisdiction of claims for money made against an executive department and transmitted to that court for final adjudication. As the Bowman Act makes no reference to that section and contains no

words of repeal, we can not suppose that Congress intended to take from the Court of Claims jurisdiction to render judgment in cases coming before it under the Revised Statutes. The object of that act is expressed in its title, and was to afford assistance and relief to Congress and the executive departments in the *investigation* of claims and demands against the Government. To that end, and in respect of claims and demands involving controverted questions of fact or law and pending in the executive departments, authority was given to the heads of such departments upon their own motion, and, whether the claimant desired it or not, to obtain for their "guidance and action" findings of fact and conclusions of law without regard to the amount involved. (*Billings* v. *United States*, 23 C. Cls. R., 166, 174.) Neither expressly nor by necessary implication did that act take from an executive department the right to send to the Court of Claims for *final adjudication* any claim made against it that was embraced by section 1063 of the Revised Statutes. *So far as the Bowman Act related to claims for money pending in an executive department, it only authorized the head of the department to send them to that court for a report of facts and conclusions that would not have the force of a judgment reviewable by this court.* In this view there is no conflict between the Bowman Act and the Revised Statutes. As there are no words of repeal in the Bowman Act, we have given it such construction as will make it consistent with previous legislation, *and thus avoid the abrogation of existing statutes which Congress had not repealed either expressly or by necessary implication.* The second section of the Bowman Act should be construed as if it were a proviso to section 1063 of the Revised Statutes. Thus construed, the later statute is not in conflict with the earlier one.

The act of 1891 and the sections in question are consistent and can stand together on the question presented. They do not touch at this point. If they do not stand together a hiatus is made in the law.

Section 4 of the act of 1891, set out by the court on page 138, provides that—

> The review by appeal, by writ of error, or otherwise from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same.

This is not a "review by appeal, writ of error, or otherwise."

Such review refers to a final judgment. Here judgement is suspended. The judges simply ask for instructions that they may proceed to judgment. Review by appeal, writ of error, or certiorari is not dependent on the will of the trial judge, and the power to review is in the higher court and is independent of his action. In the case certified the jurisdiction of the appellate court is dependent upon and created by the act of the lower court. Uniformity was aimed at by permitting the lower courts on new and doubtful questions to take the advice of this court and so maintain harmony at the outset, and not give scope for conflicting decisions from the numerous Federal judges.

It was also intended to give the Government the right to have a declaration of the highest court upon questions of criminal law of so much doubt as to warrant the lower judges in differing in opinion, some of which questions,

viz, those upon which the circuit judge was against the Government, could not be reached except for this method.

It is in no just sense a review within the meaning and provisions of the act of 1891, and besides in respect of this particular question it can not be shown how it can be reviewed "according to the provisions of this act (1891) regulating the same."

There is nothing regulating this case in that act.

Section 14 of the act of 1891 provides that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed."

Sections 651 and 697 do not relate to appeals or writs of error, which only lie in cases of final judgment. There is nothing in those sections "inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six."

They relate to the suit at a different stage and can stand notwithstanding anything in the act of 1891.

The court manifestly, in disposing of this question, had in mind cases in which appeals or writs of error could be prosecuted to this court or the circuit court of appeals, for the opinion says:

> If so, and such division of opinion can be certified before final judgment, then all criminal cases, including those in which the judgments and decrees of the circuit courts of appeals are made final (of which the case at bar is one), as well as those which may be brought directly to this court, might, at preliminary stages of the proceedings, be brought before

> us on certificate, and, after judgment, the whole subject be reexamined on writ of error from one or the other court. This result, in itself, we think could not have been intended, and it is wholly inconsistent with the object of the act of March 3, 1891, which was to relieve this court and to distribute between it and the circuit courts of appeals, substantially, the entire appellate jurisdiction over the circuit courts of the United States. *McLish* v. *Roff*, 141 U. S., 661; *Lau Ow Bew's Case*, 144 U. S., 47; *Construction Co.* v. *Railway Co.*, 148 U. S., 372. (163 U. S., 139.)

This presents the controlling idea of the decision, but it is clear that the evil presented, and which carried so much weight toward the conclusion reached, could not exist where the judgment would have been against the Government, for such cases could never go by appeal or writ of error to a higher court.

It seems, therefore, that the reasons which controlled the court did not necessarily call for the broad statement on page 139, that—

> We are of opinion that the scheme of the act of March 3, 1891, precludes the contention that certificates of division of opinion may still be had under sections 651 and 697 of the Revised Statutes.

The court further says:

> It is true that repeals by implication are not favored, but we can not escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate (p. 140).

If, tested by its scope, its obvious purpose, and its terms, the act of March 3, 1891, *does not* cover the whole subject-matter under consideration *in this case*, then it is respectfully submitted that the jurisdiction should be entertained and the motion disallowed.

J. M. DICKINSON,
Assistant Attorney-General.